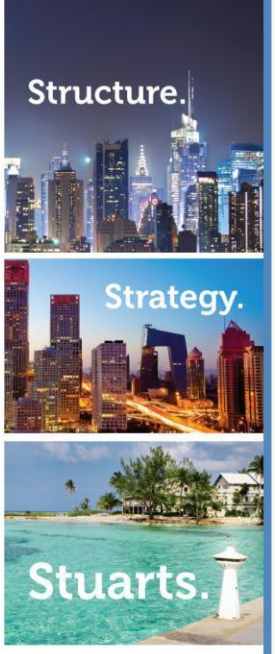
GUIDANCE NOTE

MERGERS INVOLVING CAYMAN ISLANDS COMPANIES



GUIDANCE NOTE

MERGERS INVOLVING CAYMAN ISLANDS COMPANIES

1. MERGER REGIME

Amendments to the Companies Law (as Revised) of the Cayman Islands (the "**Law**") has streamlined the mechanics for implementing mergers involving Cayman Islands companies.

What is meant by "merger" and "consolidation"?

Under the Law:

a. Merger means *"the merging of two or more constituent companies and the vesting of their undertaking, property and liabilities in one of such companies as the surviving company."*

b. Consolidation means *"the combination of two or more constituent companies into a consolidated company and the vesting of the undertaking, property and liabilities of such companies in the consolidated company."*

A "***constituent company***" means a company that is participating in a merger or consolidation with one or more other existing companies.

The legal effect of a merger is that the surviving company assumes all of the undertakings, property, assets, rights, obligations and liabilities of every non-surviving entity and the separate existence of the other companies involved in the merger ceases upon the merger becoming effective.

What entities are able to merge or consolidate under the merger regime?

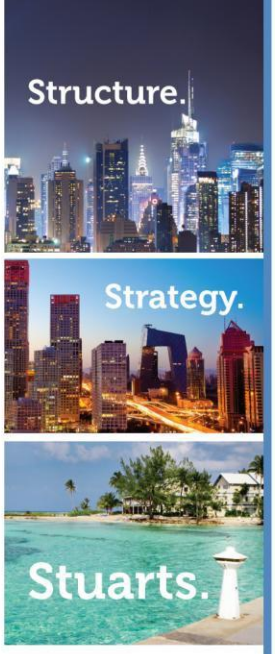
a. **Cayman Islands companies** - Two or more companies limited by shares and incorporated under the Law, and not being segregated portfolio companies ("**SPCs**"), may merge or consolidate.

   The merger regime under the Law does not cover the merger or consolidation of companies limited by guarantee or SPCs. Equally, Cayman Islands exempted limited partnerships (which do not have separate corporate personalities) fall outside the scope of the merger regime under the Law.

b. **Overseas companies -** Under the merger regime one or more Cayman Islands companies may merge or consolidate with one or more overseas companies and the surviving entity can either be the Cayman Islands company or the overseas company.

"***Overseas company***" means a company, body corporate or corporate entity existing under the laws of a jurisdiction outside the Cayman Islands.

There are a number of requirements set out in the Law which must be satisfied with respect to a merger or consolidation involving only Cayman



Islands companies or involving one or more Cayman Islands companies and one or more overseas companies.

2. STEPS FOR ACHIEVING THE MERGER OR CONSOLIDATION

Step 1 – The Plan of Merger

The directors of each "***constituent company***" that proposes to participate in a merger or consolidation must approve a written plan of merger or consolidation (the "**Plan**") in respect of the company in which they are directors.

The Plan should include, among other things:

a. the name of each constituent company and the name of the surviving or consolidated company;

b. the registered office of each constituent company;

c. in respect of each constituent company, the designation and number of each class of shares;

d. the date on which it is intended that the merger or consolidation is to take effect,

e. the terms and conditions of the proposed merger or consolidation, including, where applicable, the manner and basis of converting shares in each constituent company into shares in the consolidated or surviving company or into other property;

f. the rights and restrictions attaching to the shares in the consolidated or surviving company;

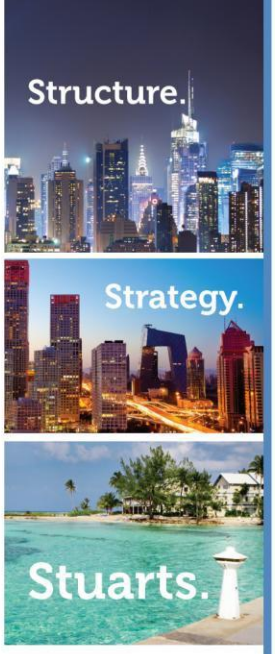
g. in respect of a merger, any proposed amendments to the Memorandum of Association and Articles of Association of the surviving company, or if none are proposed, a statement that the Memorandum of Association and Articles of Association of the surviving company immediately prior to the merger shall be its Memorandum of Association and Articles of Association after the merger;

h. in respect of a consolidation, the proposed new Memorandum of Association and Articles of Association of the consolidated company;

i. any amount or benefit paid or payable to any director of a constituent company, a consolidated company or a surviving company consequent upon the merger or consolidation;

j. the name and address of any secured creditor of a constituent company and of the nature of the secured interest; and

k. the names and addresses of the directors of the surviving or consolidated company.



Step 2 – Authorisation generally

The Plan must be authorized by each constituent company by:

a. resolution of the directors of that constituent company;

b. a special resolution of the shareholders (all voting as one class) of that constituent company who have the right to receive notice of, attend and vote at general meetings (under the Law, a special resolution is at least two-thirds majority) (or such higher number as may be specified in the constituent company's memorandum and articles of association); and

c. such other authorisation, if any, as may be specified in such constituent company's Articles of Association.

Authorisation - Parent company merging with subsidiary

Where a Cayman Islands incorporated "*parent company*" proposes to merge with one or more Cayman Islands incorporated subsidiaries, a special resolution as set out above is not required if a copy of the Plan is given to every shareholder of each subsidiary company to be merged unless waived by that shareholder.

Parent Company means a company that owns at least 90% of the issued shares of each class in a subsidiary company that is entitled to vote.

Authorisation - Consent of secured creditors

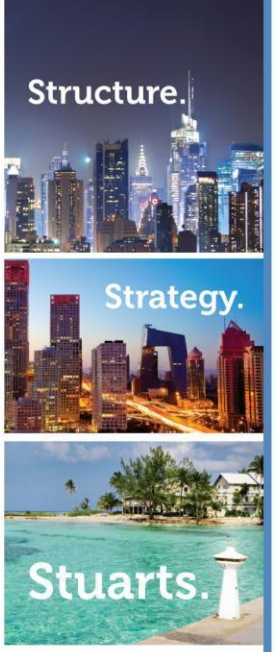
Each constituent company must also obtain the consent of each holder of a fixed or floating security interest in the company. If the secured creditor fails to grant consent to the proposed merger or consolidation then the relevant company can apply to the court for the court to waive the requirement for such consent. The court has discretion to grant the waiver upon such terms as to security to be issued by the consolidated or surviving company or otherwise as the court considers reasonable.

Authorisation - Other Consents

Other relevant consents or filings with relevant regulatory authorities in the Cayman Islands (or in the overseas jurisdiction where the overseas company is registered) should also be obtained or undertaken. For funds registered under the Cayman Islands Mutual Funds Law this might include consents from the Cayman Islands Monetary Authority. Other entities such as banks, trust companies and insurance companies will also have other consent or licensing requirements to comply with prior to a proposed merger or consolidation.

Step 3 – Filing and Registration

After obtaining all necessary authorizations and consents, the Plan must be signed by a director on behalf of each constituent company and filed with the Registrar of Companies together with the applicable fee and a



number of other supporting documents in respect of each constituent company, including, among other things:

a. a certificate of good standing;

b. a director's declaration that the constituent company is solvent (i.e. is able to pay its debts as they fall due) and that the surviving company or consolidated company will be solvent immediately after the merger or consolidation;

c. a director's declaration that the merger or consolidation is *bona fide* and not intended to defraud unsecured creditors of the constituent companies;

d. a director's declaration of the assets and liabilities of the constituent company made up to the latest practicable date before making the declaration; and

e. an undertaking that a copy of the certificate of merger or consolidation will be given to the members and creditors of the constituent company and be published in the Gazette.

Once the Registrar of Companies is satisfied that all the requirements for the merger or consolidation have been satisfied, it will register the Plan and issue a certificate of merger or consolidation. A certificate of merger or consolidation issued by the Registrar of Companies will be *prima facie* evidence of compliance with all requirements of the Law in respect of the merger or consolidation.

3. EFFECTIVE DATE OF A MERGER OR CONSOLIDATION

The merger or consolidation will be effective on the date that the Plan is registered by the Registrar of Companies, unless the Plan provides that it will not become effective until a specified date or until the date of occurrence of a specified event after it is registered, in which case it will become effective on the occurrence of the specified date or event, provided such date or event is not more than 90 days after the Plan was registered by the Registrar of Companies.

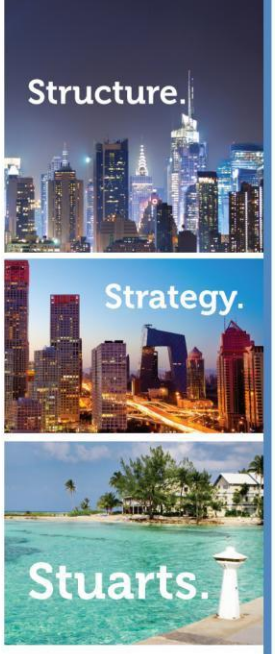
Termination or amendment of the Plan

The Plan may contain a provision that at any time prior to the date that it becomes effective, it may be terminated or amended. If the Plan is terminated or amended after being filed with the Registrar of Companies but before becoming effective, notice of such termination or amendment must be filed with the Registrar of Companies.

4. EFFECT OF MERGER OR CONSOLIDATION

As soon as the merger or consolidation becomes effective, among other things:

a. The rights, the property of every description including choses in action, and the business, undertaking, goodwill, benefits, immunities and privileges of each of the constituent companies, shall immediately vest in the surviving or consolidated company.



b. Subject to any specific arrangements entered into by the relevant parties, the surviving or consolidated company shall be liable for and subject in the same manner as the constituent companies, to all mortgages, charges or security interests and all contracts, obligations, claims, debts, and liabilities of each of the constituent companies.

c. An existing claim, cause or proceeding, whether civil (including arbitration) or criminal pending at the time of the merger or consolidation by or against a constituent company, shall not be abated or discontinued by the merger or consolidation but shall be continued by or against the surviving or consolidated company.

d. The Registrar of Companies will strike off any constituent company that is not the surviving company in a merger or strike off any constituent company that participates in a consolidation.

It is important to note that, under the Law the cessation of a constituent company that participates in a consolidation or that is not the surviving company in a merger, will not be a winding up under the Law. Accordingly, the winding up procedure under the Law and the consequent timings and costs of undertaking a winding up are avoided.

5. THE RIGHTS OF SHAREHOLDERS TO DISSENT TO THE MERGER OR CONSOLIDATION

A shareholder of a constituent company incorporated under the Law is entitled to payment of fair value of his shares upon dissenting from the merger or consolidation. Fair value can either be agreed between the company and the relevant shareholder or failing such agreement can be determined by the courts upon application. The merger regime under the Law sets out a timetable within which the dissenter is able to object to the merger or consolidation and demand payment for his shares.

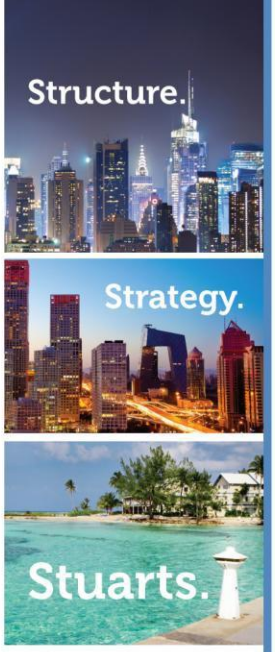
Limitations on the right to dissent

The right to dissent will not apply where an open market exists for the relevant shares of the constituent company on a recognized stock exchange or on a recognized interdealer quotation system.

The right to dissent will also not apply where, among other things, the shareholders of the constituent company as part of the proposed merger or consolidation will receive:

a. shares in the surviving or consolidated company or depository receipts in respect thereof;

b. shares in any other company or depository receipts in respect thereof which shares or depository receipts at the effective date of the merger or consolidation are either listed on a national securities exchange or designated as a national market system security on a recognized interdealer quotation system; or



c. cash in lieu of fractional shares or fractional depository receipts described in (a) and (b) above or a combination of shares, depository receipts and cash in lieu of fractional shares or fractional depository.

6. MERGERS VS SCHEME OF ARRANGEMENTS – A COMPARISON

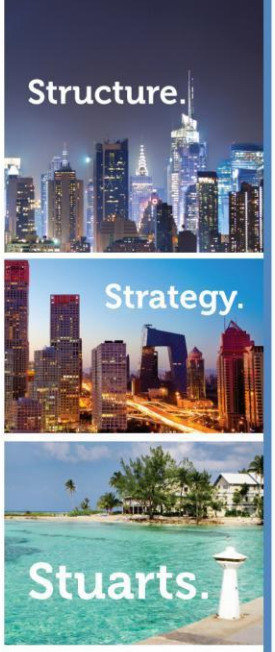
The merger regime provides, among other things, another mechanism for implementing takeover acquisitions of Cayman Islands companies, including companies listed on various stock exchanges around the world. The merger regime is in addition to the existing scheme of arrangement procedure under the Law ("**Scheme**"). Schemes will remain relevant for corporate combinations which are complicated and do not sit well within the merger regime. For example, as segregated portfolio companies are excluded from the merger regime they may still be able to use a Scheme regime to achieve combinations of share classes or of the segregated portfolio companies themselves.

The main advantages that a merger has over a Scheme are:

a. With a merger, all shareholders of target who hold the right to vote at general meetings of the company are able to vote to authorize the merger. Depending on which of the shareholders' interests conflict with the transaction being effected by the Scheme, some shareholders can be disenfranchised in a Scheme in that they cannot vote in the general group of shareholders to approve the Scheme (and most likely will form their own separate class). Accordingly, it is relatively more straightforward to obtain irrevocable voting undertakings from key shareholders of the merger target than it is under a Scheme where any arrangement or understanding between the bidder and a key shareholder of the merger target as to how they will vote could lead to that key shareholder.

b. The approval threshold for a merger is lower than it is for a Scheme. With a merger, all that is required is a special resolution of the shareholders of each constituent company who have the right to receive notice of, attend and vote at general meetings. Under the Law, a special resolution is at least two-thirds majority (or such higher number as may be specified in the constituent company's Memorandum and Articles of Association) of those shareholders voting at the meeting. With a Scheme, the threshold is a majority in number of shareholders, whose aggregated shareholding is at least 75% of the shares being voted at the meeting to approve the transaction.

   The "majority in number" requirement may give rise to a situation where the success of a takeover can be held to ransom by a few registered shareholders with comparatively small shareholdings, whilst a large shareholder with the vast majority of the shareholding and therefore the economic interests cannot on its own



approve the Scheme. This problem does not arise with mergers because on a special resolution where a poll is taken, it is shares rather than shareholders that are counted, which produces an outcome more in line with the wishes of those with economic interest in the takeover target.

c. Unlike under a Scheme, there is no requirement for court approval or sanction of a merger; with a Scheme the implementation of the Scheme is court supervised and the process can be time-consuming, rigid and costly without any guarantee that the Scheme will be approved.

d. The often arduous process of determining which shareholders form a class for the purpose of voting to approve the Scheme is not an issue in a merger as all voting shareholders vote as one class to pass the special resolution.

e. A cancellation of shares of a constituent company in a merger is not deemed a reduction of share capital under the capital maintenance provisions of the Law thereby requiring the constituent company in question to seek the court's confirmation of the share capital reduction. However, if a Scheme involves a reduction of the share capital of the company, it would be a requirement that a concurrent petition be filed with the court for the confirmation of the share capital reduction.

f. A Scheme has an advantage over a merger in that once a Scheme has been approved and court sanctioned, it binds all shareholders (including any dissenting minority) and accordingly brings certainty to the implementation of the transaction that is encapsulated within the Scheme. Shareholders who dissent or object to a merger are provided with appraisal rights in order to determine fair value for their shares. However, it is important to note that dissenting minority shareholders cannot influence the affairs of the surviving company once the merger becomes effective. The merger regime provides that dissenting shareholders lose all rights as shareholders other than the right to be paid fair value for their shares.

The merger regime has a number of advantages over a Scheme including, among other things, a merger can be undertaken without the need for court approval or (subject to any court application to have a court determination of fair value for dissenting shareholders' shares) court involvement; mergers can be between Cayman Islands incorporated companies or between Cayman Islands incorporated companies and overseas companies. As a consequence of its advantages, the merger regime in the Cayman Islands is quickly becoming the favoured mechanism for effecting all types of takeover acquisitions and restructuring transactions.

GUIDANCE NOTE

This publication is for general guidance and is not intended to be a substitute for specific legal advice. Specialist advice should be sought about specific circumstances. If you would like further information please contact:

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